Office - Supreme Court, U.
FILED
DEC 27 1951
CHARLES ELMORE CROPLE
CLERK

BEFORE THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 139

NICHOLSON TRANSIT COMPANY,
Petitioner,
vs.
THE UNITED STATES OF AMERICA,
Respondent

REPLY BRIEF OF PETITIONER TO BRIEF FOR THE UNITED STATES IN OPPOSITION

SPARKMAN DEATS FOSTER,
Counsel for Petitioner.

ALLAN B. LUTZ,
FOSTER, LUTZ & MEADOWS,
3466 Penobscot Building,
Detroit 26, Michigan,
Of Counsel.

Interstate Brief & Record Co., 642 Beaubien St., Detroit 26, Michigan

BEFORE THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 139

NICHOLSON TRANSIT COMPANY,
Petitioner,
vs.
THE UNITED STATES OF AMERICA,
Respondent

REPLY BRIEF OF PETITIONER TO BRIEF FOR THE UNITED STATES IN OPPOSITION

At the outset would say that the petitioner feels that the matters set forth in the petition for writ of certiorari to the Court of Claims, and the brief in support thereof, contain ample justification for the granting of the writ and for full hearing of the matter before this Honorable Court.

There are, however, several matters set forth in the brief for the United States in opposition which, it is felt, should be called to the attention of the Court.

On page 4 of that brief, it is stated in part:

> "As a result of the failure to maintain the vessel and because of the rough trade in which the vessel was operated, the court below found * * *."

It is felt that the Court below did not find that the vessel had not been maintained. The vessel had been used for 39 years, and it is most natural that the hull of the ship would in places be distorted, varying from slight to heavy. The Court did find that the ship had a current certificate from the United States Coast Guard and from the American Bureau of Shipping and was in operation on the Great Lakes at the time of her requisition. The Court below did find, without defining the nature of the repairs or the cost thereof, that with a considerable outlay for repairs the vessel would have a remaining useful life of 16 years from June 17, 1942. The vessel was operated in the condition in which she was maintained at an average annual net profit after deducting for overhead but before depreciation of $56,386.27 (R. 8).

With reference to page 6 of the brief of the United States, the Court below refers to the "customary methods of depreciation and the capitalization based on earnings," (R. 18) without any explanation as to what is meant by either the "customary methods of depreciation" or the "capitalization based on earnings." It is felt that specific findings should have been made as to what the Court meant by "customary methods of depreciation and the capitalization based on earnings."

The vessel, as the Court found, had been maintained and repaired so as to maintain a class for the particular trade in which she was engaged, and there is nothing in the record, nor is there any specific finding, that any major repairs or replacements would have been necessary for the vessel to have continued in use on the Great Lakes.

With respect to Argument 2, page 8, we wish to make it plain that petitioner is not contending that the Court below should have given controlling weight to the operation of the FLEETWOOD. Petitioner is arguing that in view of an average annual net profit, after deducting for overhead but before depreciation, of $56,386.27 for the five years immediately prior to taking, that the Court below must have, in view of its findings of a remaining life of 16 years, given little or no weigh to the earnings of the property which was requisitioned. It is also argued in the brief, pages 8 and 9, that a separation must thus be made against the value of the property and the value of the claimant's own business skill. There is no evidence whatever in the Court's findings or its conclusions as to any unusual business skill of the petitioner, except that it was found it was a well-managed company.

The Court specifically found in Finding No. 7 (R. 8) in part as follows:

> "* * * Her carrying capacity was (fol. 12) 2,500 tons, exclusive of bunkers and stores. She had an operating speed of about 10 miles an hour and consumed about one-half ton of coal per hour of operation. Although at times she transported other commodities, she was principally used by plaintiff for hauling steel and scrap iron. Her deckhouses were located fore and aft so that there was a clean sweep of deck between them. Because of her 65-foot hatches and low sides, she could be loaded and unloaded more quickly and more econo-

> mically than a larger vessel having a deeper draft and higher sides. She was small enough to pass through the Welland Canal and her shallow draft enabled her to reach steel mills and docks where there was very little water. Since the vessel was small and her cost of operation low, she was useful for moving commodities on trips for which plaintiff was unable to secure a full load and she was able to give plaintiff's customers better service through more frequent sailings." (R. 6-7.)

Here we have a vessel which, because of her peculiar characteristics and the fact that she was used primarily in a particular area, namely Detroit to Lake Erie ports on short runs, that she was well adapted for the trade.

Later, and under paragraph 2 of the Argument, at page 9 an effort is made to read into the record that in addition to the petitioner's astute business management, that its affiliated companies in some way contributed to earnings of the FLEETWOOD.

There is nothing whatever in the record to bear this out, the findings being to the effect that the relationships between the petitioner, Nicholson Transit Company, and the Nicholson Terminal & Dock Company were no different than between other companies (R. 7, 8). It is also argued that because of the able management and coordinated operations, petitioner and its affiliated companies enjoyed a profitable business in the Lake area. Here again the record is completely barren with respect to the earnings of any so-called affiliated company or that the earnings of the petitioner were in any way attributable to coordinated operations between petitioner and its affiliated companies.

Petitioner readily agrees that the Government did not requisition the business acumen and the management of the

petitioner and its affiliated companies, nor did the Government requisition the earnings of the FLEETWOOD. The earnings of the FLEETWOOD were not peculiar to the company rather than to the vessel, and there is nothing in the record to indicate this. In fact, the Court's finding previously referred to and quoted above (R. 6-7) clearly indicates that she was a vessel which was peculiarly adapted to the trade in which she enjoyed very profitable earnings averaged over the five years prior to taking. What petitioner is arguing is that little, if any, weight was given to the earnings of property of which the petitioner was deprived. Likewise, if the vessel had a useful life of 16 years as found by the Court below, then certainly less than two years' earnings does not constitute just compensation.

We have discussed in our principal brief the case of *United States v. Toronto Navigation Co.*, 338 U. S. 396, 402. In that case the Court of Claims, at 81 F. Supp. 237, 244, stated in part:

> "* * * In view of all the circumstances we are compelled to resort to a consideration of the earnings of the MAITLAND NO. 1 during the time that the vessel was actually operated as a carferry. * * *"

It is respectfully submitted that not only the Court of Claims, but counsel for the Government, have misinterpreted that case. This Court said at 338 U. S. 403 with respect to that specific question:

> "And past earnings are significant only when they tend to reflect future returns. We see no relevance in the MAITLAND'S earnings between 1916 and 1932 on the issue of capacity to earn after 1942, on the Great Lakes or elsewhere. On this record they are entirely too remote to bear on the vessel's value when taken." (Page 403.)

It is further argued on page 10 of the brief that to fix just compensation for the vessel upon the basis of the owner's earnings from a particular use of the vessel rather than upon its transferable value as a vessel would be to permit petitioner effectively to recover for loss of future profits contrary to the established rule that loss of future profits is not an element of compensation.

Neither of the three cases there cited has any similarity upon the facts to the present case. Here a property was requisitioned for title. What counsel for the Government are here in effect arguing is that immediate prior earnings should not be an element in the determination of just compensation. In this respect we would respectfully refer the Court to the citation on page 22 of petitioner's main brief, and the quotation from the *Monongahela Navigation Co. v. United States,* 148 U. S. 312, at page 328. Because of the argument made in the Government's brief, we desire even at the expense of repetition to quote somewhat more fully from that case:

> "* * * What does the full equivalent therefor demand? The value of property, generally speaking, is determined by its productiveness,—the profits which its use brings to the owner. Various elements enter into this matter of value. Among them we may notice these: Natural richness of the soil as between two neighboring tracts. One may be fertile, the other barren; the one so situated as to be susceptible of easy use, the other requiring much labor and large expense to make its fertility available. Neighborhood to the centers of business and population largely affects values, for that property which is near the center of a large city may command high rent, while property of the same character, remote therefrom, is wanted by but few, and commands but a small rental. Demand for the use is another factor. The commerce on the Monongahela river, as appears from the testimony of-

> fered, is great; the demand for the use of this lock and dam constant. A precisely similiar property, in a stream where commerce is light, would naturally be of less value, for the remand for the use would be less. The value, therefore, is not determined by the mere cost of construction, but more by what the completed structure brings in the way of earnings to its owner. For each separate use of one's property by others the owner is entitled to a reasonable compensation, and the number and amount of such uses determines the productiveness and the earnings of the property, and, therefore, largely its value. * * *"

With respect to footnote 6 at the bottom of page 10 of the answered brief, there is no evidence in the record to indicate that the vessel's high earnings were due to lack of any kind of repair or maintenance required and the use to which the vessel was put. The vessel was in a rough trade and, admittedly, after 39 years of use was not in the condition of a new vessel. This fact was no doubt taken into consideration in the Court's determination that her remaining life was only 16 years. Had she been in the same condition as when built, she then, of course, would have had a life according to the Court's findings of some 55 to 60 years.

Respectfully submitted,

SPARKMAN DEATS FOSTER,
ALLAN B. LUTZ and
FOSTER, LUTZ & MEADOWS,
3466 Penobscot Building,
Detroit 26, Michigan,
Of Counsel for Petitioner.

December 20, 1951.